



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

June 18, 2015

The Honorable Sally Jewell
Secretary
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20420

Re: OSC File No. DI-15-1504

Dear Madam Secretary:

Pursuant to my responsibilities as Special Counsel, I am sending to you a whistleblower disclosure that officials at the Department of the Interior, Bureau of Indian Affairs (BIA), Crow Creek Agency, Social Services Program, Child Protection Division, Fort Thompson, South Dakota, may have engaged in actions that constitute a violation of law, rule, or regulation; gross mismanagement; an abuse of authority; and a substantial and specific danger to public health and safety.

██████████ a child welfare specialist, disclosed that his supervisor improperly placed children in treatment facilities and failed to perform mental health evaluations as required prior to placement. ██████████ consented to the release of his name. The allegations to be investigated are as follows:

- Social Services Program Manager ██████████ who is not a licensed mental health professional, improperly recommends the placement of children in psychiatric facilities without the requisite authority to do so; and
- ██████████ has repeatedly failed to ensure that a psychological evaluation was performed when she recommended the placement of individuals in psychiatric treatment facilities, in violation of state and tribal laws.

I. Background

██████████ has been an employee with BIA since 2014. He works in the Child Protection Division within the Social Services Program, under the supervision of ██████████. This Division assists families with mental, emotional, behavioral, and substance abuse issues, and determines whether these issues can be treated on an outpatient basis. If outpatient care is not appropriate, then the Social Services Program makes a recommendation to the tribal court that the individual receive inpatient treatment at a

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psychiatric facility. As explained more fully below, the recommendation must include a clinical evaluation conducted by a qualified mental health professional. The tribal court then issues an order based on the Social Services Program's recommendation, and South Dakota Medicaid pays the cost of the individual's treatment. [REDACTED] alleges that in at least 50 cases, dating back as early as 2010, the required mental health evaluation was not included in the agency's recommendation for inpatient treatment.

[REDACTED] provided the example of Client 1 to illustrate the failure to conduct and include a mental health evaluation in agency inpatient recommendations. On February 10, 2014, Client 1¹ was placed in the custody of the Crow Creek Sioux Tribal Court after his legal guardian passed away. On February 20, 2014, he was deemed a "Child In Need of Supervision," and on March 26, 2014, was placed in the Lower Brule Juvenile Detention Center after he engaged in disruptive behavior at school. [REDACTED] submitted a Violation of Probation Affidavit documenting the disruptive behavior.

On March 28, 2014, [REDACTED] submitted an application to the South Dakota Medicaid Program to fund Client 1's inpatient treatment for his behavioral issues. In the application, [REDACTED] cited Client 1's inappropriate touching of another child in 2012 as well as his potential harmful behavior towards himself and others in 2014. [REDACTED] explained that the application referred to a psychological evaluation that was completed on January 13, 2014; however, he stated that the documents, which were Subjective Objective Assessment Plans (SOAPs), did not mention that Client 1 had any sexual abuse issues. [REDACTED] contended that the SOAPs, dated January 13, 2014, October 18, 2013, and September 3, 2013, were not used to determine the appropriateness of Client 1's placement in the Sexually Reactive Unit of the Aurora Plains Academy (the Academy).² [REDACTED] alleged that on May 15, 2014, pursuant to [REDACTED] recommendation, the Crow Creek Tribal Court ordered the transfer of Client 1 from the Lower Brule Juvenile Detention Center to the Academy's Sexually Reactive Unit.

During Client 1's review hearing on October 13, 2014, the Crow Creek Tribal Court found that Client 1 had not received a psychological examination and ordered [REDACTED] to perform an evaluation. [REDACTED] is a qualified mental health professional, pursuant to South Dakota Code 27A-1-3(9), and he is licensed in the State of New Mexico. [REDACTED] performed a psychiatric evaluation on Client 1 and found that Client 1 did not present any clinical findings that indicated that he sexually abused

¹ Client 1 is a minor and OSC has omitted his name for privacy reasons. [REDACTED] is available to discuss details regarding this client privately with the investigators.

² The Aurora Plains Academy is a residential psychiatric treatment facility that works with youth who may have behavioral disorders, sexually reactive behaviors, and other diagnoses. The Sexually Reactive Unit treats adolescent males with a history of sexually acting out behaviors. Clinicare Corporate Office, Aurora Plains Academy, <http://www.clinicarecorp.com/aurora-plains/programs-and-services/clinical-and-rehabilitation/> (last visited June 4, 2015).

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other minors. Based on this information, [REDACTED] contended that Client 1 was improperly placed in the Sexually Reactive Unit.

In addition, the director of clinical services and Client 1's therapist, Jeremy Pischke, emailed [REDACTED] on December 19, 2014, stating that the Academy would not accept patients from the BIA Social Services Program unless all of the "necessary assessments and evaluations have taken place prior to placement." Mr. Pischke's email also stated that, prior to admission, the Academy would ensure that each patient understands which unit he or she will be placed in as well as the treatment plan. However, according to an email [REDACTED] sent to Mr. Pischke on May 21, 2014, Client 1 did not know that he was going to be placed at the Academy for treatment regarding sexual abuse issues.

II. [REDACTED] lacks the requisite qualifications to place minors in residential psychiatric facilities.

[REDACTED] alleged that [REDACTED] has repeatedly violated South Dakota law by carrying out the functions of a qualified health professional and recommending Client 1's placement in the Academy. South Dakota law states that "a minor may be subject to involuntary commitment utilizing the same procedures, criteria, and rights provided in chapter 27A-10..." S.D. CODIFIED LAWS § 27A-15-28 (1991). Section 27A-10-6 states that "a qualified mental health professional designated by the chair of the county board serving the area where the person is detained other than the person bringing the petition or initiating the hold shall perform an examination, including a mental status examination, of the person." S.D. CODIFIED LAWS § 27A-10-6 (2000). A qualified mental health professional is defined as "[a] certified social worker with a master's degree from an accredited training program and two years of supervised clinical experience in a mental health setting." S.D. CODIFIED LAWS § 27A-1-3(3) (2013). On October 13, 2014, prior to Client 1's review hearing, [REDACTED] told [REDACTED] that she was not a qualified mental health professional, and that she was pursuing a Master of Social Work degree at the University of North Dakota.

[REDACTED] explained that pursuant to South Dakota Codified Laws §§ 27A-15-28 and 27A-10-6, the recommendation that a minor be placed in an inpatient psychiatric facility requires a clinical evaluation by a qualified mental health professional. Because [REDACTED] is not a qualified mental health professional, she was not authorized to perform a psychiatric evaluation of Client 1, nor was she qualified to recommend his placement in the Academy. [REDACTED] alleges that [REDACTED] has inappropriately intervened in approximately 50 cases similar to Client 1 since 2010.³

³ [REDACTED] also disclosed that [REDACTED] first-line supervisor, Deputy Superintendent [REDACTED] and second-line supervisor, Superintendent [REDACTED] are aware that [REDACTED] is not a qualified mental health professional because [REDACTED] has taken leave to complete her schoolwork, and these individuals have authorized her leave. [REDACTED] contended that [REDACTED] and [REDACTED] have

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III. [REDACTED] failed to ensure that a psychiatric evaluation was performed.

[REDACTED] alleges that because [REDACTED] does not have the requisite qualifications to recommend inpatient treatment for agency clients, she should have ensured that a psychiatric evaluation be conducted. Specifically, with regard to Client 1, [REDACTED] should have made sure that a psychiatric evaluation was performed before he was placed into the Academy. [REDACTED] explained that if a clinical evaluation had been done prior to Client 1's admission to the Academy, it would have determined whether it was appropriate for Client 1 to be placed in the Sexually Reactive Unit. Because a clinical evaluation was not performed, [REDACTED] contends that Client 1's placement in the Sexually Reactive Unit was improper.

In addition, the Law and Order Code for the Crow Creek Sioux Tribe § 13-1-14 states, "A petition for treatment shall be accompanied, whenever possible, with a certificate of a qualified mental health professional or physician. If a certificate does not accompany the petition, the petition must set forth the reasons that an examination could not be secured." Section 13-1-16 also states that the certificate of examination must be based on a personal examination of the patient, and lists the required contents of the examination.

The South Dakota Administrative Rules also provide that a certification team must approve an individual's admission to a treatment facility prior to admission. S.D. ADMIN. R. 67:16:47:05 (2014). A certification team "must include at least one physician and must be knowledgeable about the diagnosis and treatment of the mental illnesses of children and of the individual's current situation." S.D. ADMIN. R. 67:16:47:04:03 (2007). Based on the Administrative Rules, [REDACTED] explained that a certification team should have approved Client 1's admission to the Academy prior to his admission. [REDACTED] further explained that [REDACTED] should have included a certificate of examination when she recommended that Client 1 be admitted into the Academy, or provided a reason for why an examination was not performed.

[REDACTED] reported that Client 1 was prematurely placed in the Academy and is still a resident at the facility. [REDACTED] explained that the Academy will not release Client 1 until he admits that he has engaged in sexual misconduct. [REDACTED] alleges that [REDACTED] has acted similarly in a significant number of other cases, and that her actions could lead to inappropriate placement in inpatient treatment, constituting both a violation of law, rule, or regulation, and a substantial and specific danger to public health.

violated the law by allowing [REDACTED] to continue making recommendations for individuals to be placed into inpatient psychiatric facilities, placing patients at risk.

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The Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. 5 U.S.C. § 1213(a) and (b). If I find, on the basis of the information disclosed, that there is a substantial likelihood that one of these conditions exists, I am required to advise the appropriate agency head of my findings, and the agency head is required to conduct an investigation of the allegations and prepare a report within 60 days of notification of the allegations. 5 U.S.C. § 1213(c). OSC will not routinely grant an extension of time to an agency in conducting a whistleblower disclosure investigation. However, OSC will consider an extension request where an agency concretely evidences that it is conducting a good faith investigation that will require more time to successfully complete.

Upon receipt, I review the agency report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2). I will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

I have concluded that there is a substantial likelihood that the information [REDACTED] provided to OSC discloses a violation of law, rule, or regulation; gross mismanagement; an abuse of authority; and a substantial and specific danger to public health and safety. As previously stated, I am referring this information to you for an investigation of the whistleblower's allegations and a report of your findings within 60 days of your receipt of this letter. By law, this report should be reviewed and signed by you personally. Nevertheless, should you delegate your authority to review and sign the report to the Inspector General, or other agency official, the delegation must be specifically stated and must include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5). The requirements of the report are set forth at 5 U.S.C. § 1213(c) and (d). A summary of section 1213(d) is enclosed.

Further, in some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their claims. I urge you to take all appropriate measures to ensure that those reporting wrongdoing, including [REDACTED] are protected from such retaliation and from other prohibited personnel practices, including informing those charged with investigating these allegations that retaliation is unlawful and will not be tolerated.

At the outset, or during the course of your investigation, your investigative team may have questions regarding the statutorily mandated report you will deliver to OSC

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under 5 U.S.C. § 1213. OSC attorneys are available in person or by telephone to discuss OSC's statutory process, expectations for credible, consistent, and complete reports, and for general assistance. Please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 254-3604 to initiate this process.

As required by 5 U.S.C. § 1213(e)(3), I will send copies of the report, along with any comments on the report from the whistleblower and any comments or recommendations from me, to the President and the appropriate oversight committees in the Senate and House of Representatives. Unless the report is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs, OSC will place a copy of the report in a public file in accordance with 5 U.S.C. § 1219(a). To prevent public disclosure of personally identifiable information (PII), OSC requests that you ensure that the report does not contain any sensitive PII, such as Social Security numbers, home addresses and phone numbers, personal e-mail addresses, dates and places of birth, personal financial information, and patient names. OSC does not consider names and titles to be sensitive PII requiring redaction. Agencies are requested not to redact such information in reports provided to OSC for the public file.

Please refer to our file number in any correspondence on this matter. If you need further information, please contact Ms. McMullen. I am also available for any questions you may have.

Sincerely,



Carolyn N. Lerner

Enclosure

cc: Mary L. Kendall, Deputy Inspector General

Requirements of 5 U.S.C. § 1213(d)

Any report required under subsection (c) shall be reviewed and signed by the head of the agency¹ and shall include:

- (1) a summary of the information with respect to which the investigation was initiated;
- (2) a description of the conduct of the investigation;
- (3) a summary of any evidence obtained from the investigation;
- (4) a listing of any violation or apparent violation of law, rule, or regulation; and
- (5) a description of any action taken or planned as a result of the investigation, such as:
 - (A) changes in agency rules, regulations or practices;
 - (B) the restoration of any aggrieved employee;
 - (C) disciplinary action against any employee; and
 - (D) referral to the Attorney General of any evidence of criminal violation.

In addition, we are interested in learning of any dollar savings, or projected savings, and any management initiatives that may result from this review.

To prevent public disclosure of personally identifiable information (PII), OSC requests that you ensure that the report does not contain any sensitive PII, such as Social Security numbers, home addresses and phone numbers, personal e-mail addresses, dates and places of birth, and personal financial information. With the exception of patient names, OSC does not consider names and titles to be sensitive PII requiring redaction. Agencies are requested not to redact such information in reports provided to OSC for inclusion in the public file.

¹ Should you decide to delegate authority to another official to review and sign the report, your delegation must be specifically stated.